

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JAMES A. BURK, JR., et al.,

Plaintiffs,

v.

CITY OF COLUMBUS, et al.,

Defendants.

Case No. 2:20-cv-6256

Judge James L. Graham

Magistrate Judge Chelsey M. Vascura

**DEFENDANTS' SECOND SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE
OR LIMIT THE TESTIMONY OF PLAINTIFFS' EXPERT, SCOTT DEFOE**

Defendants Joseph Fihe and Kevin Winchell move this Court for an order excluding or limiting the testimony at trial of Plaintiffs' designated police procedures expert witness, Scott DeFoe. On November 1, 2024, the Court issued an order regarding the nationally accepted principles of law enforcement, specifically regarding command and control between uniformed and non-uniformed officers at the scene of a suspected crime. ECF No. 161. The Court appropriately determined that DeFoe "incorrectly applies a use of force analysis to orders issued by the uniformed officers, which would permit the non-uniformed officer to second-guess the reasonableness" of the orders "under the totality of the circumstances." DeFoe's standard is not consistent with principles of law enforcement. *Id.* In addition, it is not consistent with the Fourth Amendment's 'objective reasonableness' standard. DeFoe's standard incorrectly considers the "totality of the circumstances" known to Burk, despite recognizing this information is not known to the Defendant officers. ECF 53-1, 138:14-24, 139:1-4. In evaluating the reasonableness of the Defendant Officers' actions, the jury must consider the totality of the circumstances confronting

the Officers, not Burk. *Graham v. Connor*, 490 U.S. 386 (1989). DeFoe goes so far to say the orders of Defendant officers are unreasonable because of the “tactical concerns of the potentially armed individual inside the residence.” ECF 53-1, 236:21-24, 237:1-4. Again, DeFoe inappropriately considers information not known to Defendant officers. DeFoe’s proffered testimony is irrelevant, confusing, and unduly prejudicial. DeFoe should be excluded from offering testimony inconsistent from the Court’s order.

DeFoe’s opinions directly contradict the findings and specifications of ATF’s internal investigation into Mr. Burk’s conduct on July 7, 2020. For example, the investigation found that Burk resisted handcuffing, but DeFoe believes Burk’s employer got it wrong. *Id.* at 231:18-24, 232:1-10. DeFoe provides conflicting testimony about whether Defendant officers are expected to know the reason why a suspect is resisting. *Id.* at 227:11-24. DeFoe’s opinion is irrelevant and confusing because it, again, is not consistent with nationally accepted law enforcement principles. DeFoe should be excluded from offering testimony inconsistent with these law enforcement principles. If DeFoe is permitted to testify, Defendants should be permitted to rebut DeFoe’s testimony with findings from ATF’s internal investigation that contradict DeFoe’s opinions.

For the reasons stated above, Defendants Joseph Fihe and Kevin Winchell, respectfully move this Court for an order excluding or limiting the testimony at trial of Plaintiffs’ designated police procedures expert witness, Scott DeFoe.

Respectfully submitted,

/s/ Sheena D. Rosenberg

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CERTIFICATE OF SERVICE

I hereby certify that, on November 2, 2024, I electronically filed the foregoing with the Clerk of the Court by using this Court's CM/ECF System. Copies will be served upon counsel of record by, and may be obtained through, the Court's CM/ECF System.

/s/ Sheena D. Rosenberg
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